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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 MEDTECH PRODUCTS INC.,
4 Plaintiff,

5 v.

07 Civ. 3302 (LMS)

6 RANIR, LLC and
7 CVS PHARMACY, INC.,

8 Defendants.

9 MEDTECH PRODUCTS INC.,

10 Plaintiff,

11 v.

12 DENIEK ORAL CARE, INC.,

13 Defendant.

14 MEDTECH PRODUCTS INC.,

15 Plaintiff,

16 v.

17 POWER PRODUCTS, INC.,
18 d/b/a SPLINTEK,

19 Defendant.

20 White Plains, N.Y.
21 July 9, 2007

22 Before:

23 THE HONORABLE LISA MARGARET SMITH,
24 Magistrate Judge

25 Proceedings recorded by
electronic sound recording.

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APPEARANCES

2 ALSTON & BIRD, LLP
3 Attorneys for Plaintiff
4 W. EDWARD RAMAGE
KARL GEECKEN

5 KIRKENTRICK & LOCKHART
6 Attorneys for Defendant Power Products, Inc.
KATHY DUTTON HELMER

7 HRESTON, GATES & ELLIS, LLP
8 Attorneys for Defendant Power Products, Inc.
9 HARRY PICKENS
Via Telephone

10 PROSKALER ROSE
11 Attorneys for Defendant Denitek Oral Care, Inc.
12 JAMES SHALEK
GREGORY J. SIECZKIEWICZ

13 THE DEPUTY CLERK: Your Honor, this is in the matter
14 of Medtech versus Ranir, et al. It's consolidated.

15 Messrs. Geerken and Ramage for the plaintiff.

16 Ms. Helmer is here, Mr. Sieczkiewicz and Mr. Shalek.

17 Mr. Pickens is available by telephone.

18 THE COURT: Good morning.

19 I've reviewed the file. I've reviewed the transcript
20 of the last appearance in which Judge Briesant resolved the
21 issue of the preliminary injunction. I've reviewed the motion
22 for leave to file an amended complaint, the opposition from
23 Denitek, and the reply to that.

24 Is there anything else on the motion that I ought to
25 be aware of?

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1 Who should I be looking to here? Is it Mr. Ramage?

2 MR. RAMAGE: Mr. Ramage, your Honor.

3 THE COURT: Ramage.

4 MR. RAMAGE: That's right. Mr. Galvin pronounced it
5 the same way half my family does, so . . .

6 With regard to that motion, I believe the briefing has
7 been completed on that.

8 There is another matter with regard to some timing of
9 some depositions. We filed a brief motion on that this
10 morning, and I believe it would be an appropriate matter for
11 the parties — Denitek in this case, counsel for Denitek, and
12 plaintiff — to take up perhaps before your Honor for some
13 guidance on that.

14 There also was a preliminary housekeeping matter.

15 We have severed with Ranir and CVS Pharmacy in this
16 case. They have been dismissed. We were not sure of the
17 procedure the Court would like us to follow with regard to
18 correcting the caption. I have simply identified several
19 different ways in several different courts including just
20 automatically making the correction, filing a stipulation to
21 the correction.

22 I ask the Court, what would you prefer in this case?

23 THE COURT: Typically, we don't worry about changing
24 the caption. We just let things go forward. It's very
25 complicated for the Clerk's Office to try to change things.

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1 And then they come in, in a variety of other ways. So
2 typically, we just leave it with the lead party, even though
3 they're no longer in.

4 And it is at least my practice that pleadings don't go
5 in to the jury, anyway, so it's a matter of housekeeping that
6 we don't have to worry about. Don't spend any time worrying
7 about it.

8 All right. So is there anything further you want to
9 say in support of the motion to amend?

10 MR. RAMAGE: The only thing with regard to the motion
11 to amend, your Honor, is very simply that we don't see any
12 delay by granting the motion to amend. We don't think that
13 granting the motion to amend will slow this case down.

14 Obviously, what we did with Judge Briesant was agree to
15 a super rocket docket, a super accelerated case in discovery.
16 All our depositions have to be completed by September 21st, and
17 discovery concluded shortly thereafter.

18 Ms. Kaplan's role and activities already are subject
19 to discovery requests. She's already been identified as a
20 party of interest in this case. She's going to be deposed in
21 this case. And I'd like Ms. Kaplan to be produced in this
22 case.

23 The only inefficiency is if we're required to file a
24 separate lawsuit bringing these claims, with the likelihood or
25 possibility that that case might end up being consolidated with

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1 this case. And simply, I'd ask that the motion be granted.

2 THE COURT: Do you have any response to the assertion
3 that you ought to be required to specify the — I didn't see
4 anything in your reply — the — let me see if I can find
5 the — that you ought to provide a detailed description of the
6 confidential information, purportedly proprietary, which was
7 misappropriated?

8 MR. RAMAGE: No, no. Ms. Kaplan was one of the
9 principal five officers of the company. She was vice
10 president, I believe, in charge of marketing. She had intimate
11 access to marketing information, manufacturing information,
12 business relationships, including business relationships with
13 the three doctors at Tufts that are the subject of the subpoena
14 and deposition set for after the 23rd of this month.

15 Without deposing her, without looking at her
16 information, we can't, your Honor, get more specific than that,
17 because she, quite frankly, had access to all the confidential
18 information of the company. What specifically she disclosed,
19 the contact relationships she has, she currently is the brand
20 manager for Dantek for this competing brand. Given the overall
21 circumstances, until we conduct some discovery, until we take
22 her deposition, until we see what documents she has provided to
23 Dantek, we can't get more specific than that.

24 THE COURT: Okay. Thank you.

25 Should I be looking to Mr. Shalek or Mr. Siczekiewicz?

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1 Is that close?

2 MR. SHALEK: Mr. Shalek. Thank you, your Honor.

3 Seen for what it is, I think Mr. Ramage's response is
4 a candid admission that there are no trade secrets or
5 confidential business information that they're able to
6 identify, and they have no business bringing in a new party and
7 raising a claim.

8 For example, he mentions business relationship with
9 three doctors. Those doctors have now been subpoenaed. They
10 are the leading experts in the world on the condition that is
11 at issue in this lawsuit, bruxism or grinding your teeth at
12 night. They're at Tufts Dental School and identifiable, well
13 known in the industry, easily identifiable.

14 However, the notion that there is anything
15 confidential about their existence, their knowledgeability and
16 approaching them for consultation is simply not something that
17 will withstand any kind of scrutiny, without some
18 identification of what it is that they claim was proprietary
19 still, and we have no way of judging relevance of their
20 request. We have no way of really assessing what impact this
21 kind of claim will have on the schedule.

22 So I think that if there is some kind of claim here,
23 it's very important that we hear what it is early in order to
24 allow us to conduct discovery properly and evaluate its impact.
25 And I would submit that what Mr. Ramage has identified would

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1 not be sufficient to survive a motion for summary judgment.

2 And, your Honor, to be candid, if the Court were
3 inclined to grant leave to amend, we would immediately move for
4 a protective order seeking identification of the trade secrets
5 before moving forward with discovery.

6 THE COURT: What's the status with regard to
7 representation of the proposed new defendant?

8 MR. SHALEK: We know that she has spoken with outside
9 counsel and selected somebody that she likes. Whether that has
10 actually been finalized, in terms of crossing the "T"s and
11 dotting the "I"s, I don't know yet, your Honor.

12 THE COURT: So you're not representing her.

13 MR. SHALEK: I am not.

14 THE COURT: Well, Mr. Ramage, perhaps the right thing
15 to do, then, is to allow you to do your initial discovery, and
16 then allow you to make the motion. And I'll extend the date
17 for amending the complaint. And then, quite frankly, we'll
18 have to re-open depositions and go back and do things all over
19 again once she's in the case.

20 MR. SHALEK: Your Honor, on the discovery, we've got
21 four third-party subpoenas outstanding. They were served in
22 violation of the scheduling order to which we both agreed.
23 First, they were served too early. Second, they were served
24 before the responses to document requests. And third, we had
25 agreed for — the order specified that party depositions would

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1 go forward first.

2 We also weren't consulted before the subpoenas were
3 served, and extended the courtesy of discussing dates. So what
4 we have now are four subpoenas out there, which we think were
5 served in violation.

6 But if the Court's inclined to go forward, that's
7 fine. But we don't think it's appropriate, one, for them to
8 simply rummage through the files of third parties or our
9 client, identifying what it is that they're looking for, in
10 terms of confidential business information. That's not the way
11 the system works, is that you go out on a fishing expedition
12 looking for a claim. There has to be some indication of a
13 wrong and what was done wrong to lay out the parameters of
14 relevance.

15 And so that's the first issue.

16 And the second issue is, on the scheduling of these
17 third-party subpoenas, we would like to have the opportunity to
18 confer with the other side and pick some dates that are
19 convenient to all parties concerned. Although our belief is
20 that it's more efficient to wait until Ms. Kaplan is in the
21 case to move forward and she's represented. These depositions
22 impact her, as well.

23 THE COURT: Well, we're not — if we're waiting until
24 they have enough information to be able to withstand a motion,
25 then we're not holding other things in abeyance pending the

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possibility that Ms. Kaplan will subsequently be brought into the case. That's just not happening. We're moving forward with discovery with the parties that are currently in. And if it's necessary to go back and redo what's already been done and re-open depositions, then that's what we'll have to do. But I'm not going to hold things in abeyance pending the possibility of something that may or may not happen.

MR. SHALEK: I understand that, your Honor. But right now, there is no "trade secret" claim in the case. That was not in the original complaint. So technically, there is no claim in the case directed to purported misappropriation of confidential business information by anyone.

So you know —

THE COURT: Well, what are these subpoenas? I haven't seen them. I don't know what you're talking about with any specificity.

MR. SHALEK: Okay. They subpoenaed a former sales representative of the plaintiff, who was a consultant for Defendant DenTek for a two-month period. And they're basically going on a fishing expedition, hoping to find some movement of their confidential information into DenTek, and they assert a document request and subpoena, as well. That's one.

The other three subpoenas, which we just got last Friday afternoon, are essentially directed to three doctors at Tufts Medical School that have done some consulting for both

parties. And I assume that their theory is that there is something confidential about these world-renowned experts on this particular area. But what it is, we don't know.

And you know, as I mentioned, we're at a loss, your Honor, because right now, there is no claim directed to misappropriation of confidential information, and we have no idea what it is they're talking about, what they claim that we've taken, and why these people's depositions would be relevant to something that's in the case.

MR. RANAGE: Your Honor, if I may address very briefly the four individuals.

The first individual is Ray Duane, Raymond Duane. He is far more than a former salesperson for Dental Concepts.

Let me give the Court just a very quick background. Madtech, plaintiff in this case, acquired Dental Concepts by acquisition in November of 1995, and paid a handsome sum for that acquisition.

THE COURT: Your motion says 2005. Should it —

MR. RANAGE: Excuse me. 2005. I'm sorry.

It's been a long morning on a plane, your Honor, and I'm a little bit dehydrated.

And subsequent to that, right at the time they acquired, there were five primary individuals leading Dental Concepts, two of whom, Carol Kaplan and Ray Duane, have been discussed this morning.

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Ray Duane, I believe he was the vice president in charge of marketing?

MR. SHALEK: Sales.

MR. RANAGE: Sales. Excuse me. He's vice president in charge of sales. Carol Kaplan was the one vice president in charge of marketing.

And, in fact, in January of this year, we, through some e-mail conversation, he told us that he had done, in fact, a limited two-month consulting gig with DenTek, and we didn't think anything of it at the time. We thought it was over.

We were surprised about three weeks ago — and this is the reason for the subpoena that we filed two and a half weeks ago. We were surprised to find Mr. Duane representing DenTek at a National Association of Chain Drugstores conference in Boston, along with Carol Kaplan. In fact, he's listed in the attendance program as a consultant representing DenTek Oral Care, Inc.

Given the circumstances, he, like Carol Kaplan, signed a release agreement at the time of the acquisition. They were paid a handsome amount of money in order to maintain the information of Dental Concepts in confidentiality.

We believe that Carol Kaplan — that's the reason for the amendment — has violated that confidential agreement. Given Mr. Duane's involvement at this point, which is a surprise to us, we hear that he may, in fact, have also

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violated that agreement. However, we don't want to sue him unnecessarily. We don't want to bring him in as a defendant or in any lawsuit anywhere without trying to determine whether or not — what his involvement is with DenTek.

If, in fact, the defendants are correct and his involvement is minimal, he hasn't disclosed anything to DenTek, then we will have — quickly get in and out of the depositions. We'll be able to review a small limited amount of documents under the subpoena, and that will be the end of it. We can proceed forward.

There are two parts to all of these subpoenas, your Honor. There is request for production of documents, which we are entitled to have; and then the issue that we're discussing here, which is the timing of the actual depositions themselves. And we are very willing to be flexible with regard to the timing of those.

Mr. Duane's case, we wanted his deposition as quickly as possible, because we have here one of the top five former officers all of a sudden showing up representing a defendant in a lawsuit — excuse me — representing a company that we have sued, and who has just entered into the market with a competing product. (unintelligible) infringes trademark rights, patent rights, copyrights, and, basically, is engaged in unfair competition.

The Tufts individuals —

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By the way, Mr. Duane, because of his relationship with DenTek at this point, we don't really think of him as a true third party. In fact, DenTek's counsel has said that they will be representing Mr. Duane. In fact, they did file a response to the subpoena duces tecum on Friday. In that response, they did say that they would be producing some documents.

There is a draft protective order that the parties have routed around. We're awaiting comments back from the defendants. And as soon as we have that agreement by all parties and entered by the Court, then we can actually get to the document production.

With regard to the Tufts doctors, they also are not true third parties. They had a consulting — confidential consulting agreement with Dental Concepts prior to the acquisition. And, in fact, Medbach was involved with about eight months of negotiations with these three Tufts doctors to do continued work for them until they backed out at the last minute, claiming that they had an unspecified agreement with an unspecified — excuse me. I think it was an unspecified company. They said they can't go into this. Why they didn't bring it up sometime in the prior eight months, we don't know.

Given all the circumstances of what has now occurred since that time, namely, the introduction of a competing product that we claim infringes our patent, and the fact that

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DenTek has achieved approval from the FDA now for over-the-counter sales — in fact, they used the same law firm that we used the prior year — we have strong suspicions that the Tuft doctor may have — Tufts doctors may have information that is relevant to this case. If, in fact, it turns out that they don't, we've gotten them out of the way early on in the case, and we can move on.

And the date for those, your Honor, has now been set. I believe we have noticed those for the week of the 23rd, beginning the week of the 23rd.

THE COURT: July 23rd.

MR. RAMAGE: July 23rd.

THE COURT: Mr. Shalek?

MR. SHALEK: Yes, your Honor.

I think in the first instance, Mr. Ramage has been very candid in saying that what he hopes to do is go and find a violation, rather than prove one that's been raised by the pleadings.

If, in fact, the Court is inclined to allow discovery to go forward of these parties, what we have in the case is a patent, a trademark and a copyright claim, along with some general unfair competition that relates to that. We still don't know what the confidential information that they claim has been taken, as we still don't have it in the pleading.

But what we would propose is that if they go forward

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with those depositions that they be required, before they be permitted to amend the complaint, to identify with specificity what, in fact, the trade secrets and confidential business information is.

Our position, your Honor, is, frankly, they should have to do it today in order to go forward. But if the Court is inclined to let these depositions go forward, to let them try and find something, we think it's only fair that before we get into a new lawsuit, we know what it's about.

And, your Honor, relative to scheduling, Mr. Ramage has said the depositions have been — subpoenas have been set for the 23rd, 24th, 25th. We weren't even consulted before these subpoenas were served. And I think it just is a matter of courtesy that counsel ought to work with us in finding some available dates.

I know, for example, that Mr. Duane's available the 26th or 27th, but not available the specific date they subpoenaed him. They draw up the subpoena on him on June 30th with a return date on document production on July 6th, and deposition on July 10th.

THE COURT: Ms. Helmer, I think you're up, if you have anything to add.

MS. HELMER: No, your Honor. We are — pardon me, your Honor. We represent Medbach/Power Products, Inc. We're are not involved with the patent claims or the "trade secret"

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claims that are at issue between the plaintiff and DenTek?

(Pause)

THE COURT: Might I inquire. In the transcript before Judge Brieant, there was some indication, Mr. Ramage and Mr. Shalek, that your clients were talking about a possible disposition. Is that no longer a possibility?

MR. RAMAGE: In fact, we're meeting, your Honor, this afternoon at 2:30.

And by the way, the 26th, 27th, if that is a date that the defendant's counsel is saying will be acceptable to Mr. Duane, that's perfectly acceptable with us, as well.

THE COURT: Well, it's not my practice to micromanage dates unless counsel are so completely at odds with one another that they can't do it themselves. Especially with this number of attorneys, it ends up being very difficult, and I'd like to leave it in counsel's hands.

What I suggest is that while you're here, you talk to each other, you find some dates that everybody can work out, and then try to find within those dates some dates that the various witnesses can reach.

I'm going to order the motion to amend held in abeyance, pending some initial discovery. I'm going to allow the discovery to go forward.

It seems to me that it is sufficiently related to the pleadings and, certainly, the proposed pleadings, that it falls

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